AND
BRIEFS

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 1, 2016
CERTIORARI GRANTED OCTOBER 28, 2016

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KENTUCKY COURT OF APPEALS

KINDRED NURSING CENTERS LIMITED PARTNERSHIP,

Appellant,

v.

JANIS E. CLARK, Executrix of the Estate of Olive G. Clark, deceased,

Appellee.

No. 2012-CA-2113

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	11/19/2012	Circuit Court Judgment
2	12/7/2012	Relief Pursuant to CR 65.07
3	12/7/2012	Motion for Interlocutory Relief
4	12/18/2012	Response to Motion
11	6/25/2013	Order Denying Relief under CR 65
13	9/24/2015	Supreme Court Opinion
15	2/23/2016	Finality

KENTUCKY COURT OF APPEALS

KINDRED NURSING CENTERS LIMITED PARTNERSHIP,

Appellant,

v.

BEVERLY M. WELLNER (individually, and on behalf of the Estate of Joe P. Wellner),

Appellee.

No. 2012-CA-2112

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	11/19/2012	Circuit Court Judgment
2	12/7/2012	Relief Pursuant to CR 65.07
3	12/7/2012	Motion for Interlocutory Relief
4	12/18/2012	Response to Motion
11	6/25/2013	Order Denying Relief under CR 65
13	9/24/2015	Supreme Court Opinion
15	2/23/2016	Finality

SUPREME COURT
OF KENTUCKY

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION, et al.,

Appellants,

v.

JANIS E. CLARK, Executrix of the Estate of Olive G. Clark, deceased, and on behalf of the wrongful death beneficiaries of Olive G. Clark,

Appellee.

No. 2013-SC-430

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	6/25/2013	Judgment/Original Action Date
2	7/2/2013	Relief Pursuant to CR 65.09
3	7/10/2013	Partial Record Filed
4	7/15/2013	Respondent's Response
6	7/15/2013	Sent Out for Assignment
10	11/7/2013	Courts Own Motion: Setting Oral Argument

NO.	DATE	DESCRIPTION
11	11/19/2013	Courts Own Motion: Setting Oral Argument
12	6/22/2015	Motion as to Record
13	6/26/2015	Response to Motion as to Record
16	8/4/2015	Order – As to Record
17	9/24/2015	Opinion – Denying
18	10/9/2015	Order on Courts Own Motion
19	10/13/2015	Petition for Rehearing
20	10/26/2015	Response to Petition for Rehearing
21	11/10/2015	Sent Out for Assignment
30	2/18/2016	Order Denying Petition for Rehearing
31	2/18/2016	Finality – Publication Letter
32	2/18/2016	Finality
33	11/4/2016	Note That Certiorari Granted

THE SUPREME COURT
OF KENTUCKY

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION, et al.,

Appellants,

v.

BEVERLY WELLNER, individually and on behalf of the Estate of Joe P. Wellner, deceased, and on behalf of the wrongful death beneficiaries of Joe P. Wellner,

Appellee.

No. 2013-SC-431

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	6/25/2013	Judgment/Original Action Date
2	7/2/2013	Relief Pursuant to CR 65.09
3	7/10/2013	Partial Record Filed
4	7/15/2013	Respondent's Response
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30	2/18/2016	Order Denying Petition for Rehearing
31	2/18/2016	Finality – Publication Letter
32	2/18/2016	Finality
33	11/4/2016	Note That Certiorari Granted

GENERAL DURABLE POWER OF ATTORNEY TO CONDUCT ALL BUSINESS AND PERSONAL AFFAIRS OF PRINCIPAL

I, OLIVE G. CLARK, (SSAN # XXX-XX2445), of 536 Garden Springs Drive, Mt. Sterling, KY 40353, hereby constitute and appoint my daughter, JANIS ELAINE CLARK of 825 Sunset Drive, Lexington, Fayette County, Kentucky 40502, my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way.

Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:

To prepare and complete administrative documents necessary to secure or preserve any and all governmental benefits available to me;

To lease, sell, or convey any real or personal property that I may now or ever own;

To mortgage my property as she sees fit;

To receive and receipt for any money which may now or hereafter be due to me;

To retain and release all liens on real or personal property;

To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;

To invest or reinvest my money for me;

To institute or defend suits concerning my property or rights;

To file all tax returns (including, without limitation, state and federal income tax returns;

To enter all safe deposit boxes;

To transfer assets of mine to any trust created by me for addition to trust principal; and

Generally to do and perform for me and in my name all that I might do if present.

Also, without limiting or derogating from this general power, I authorize my attorney in fact to make all decisions regarding my health care and medical treatment.

THIS POWER OF ATTORNEY IS A DURABLE POWER OF ATTORNEY AND SHALL NOT BE AFFECTED BY MY DISABILITY AS PRINCIPAL OR OTHERWISE.

The rights, powers, and authority of my attorney in fact shall commence upon execution of this instrument and shall remain in full force and effect until this instrument is terminated by me in writing.

I hereby adopt and ratify all of the acts of my said attorney in fact done pursuant to the power hereby granted, as fully as if I were acting in my own proper person.

IN TESTIMONY WHEREOF, WITNESS my signature this 31st of August, 2006.

/s/
OLIVE G.CLARK

(STATE OF KENTUCKY)
)
(COUNTY OF _____)

Before me, the undersigned authority, came OLIVE G. CLARK, who is of sound mind and eighteen (18) years of age or older, and acknowledged that she voluntarily dated and signed this writing or directed it to be signed and dated as above.

Done this 31st day of August, 2006.

/s/ _____
(Signature of Notary Public)
Date commission expires:
10/9/2007

Prepared by:

/s/ _____
Glenn E. Acree
Acree Law Office
P O Box 25787
Lexington, KY 40583-5787
(859) 253-4664

POWER OF ATTORNEY
OF
JOE PAUL WELLNER

KNOW ALL MEN BY THESE PRESENTS:

That I, **JOE PAUL WELLNER**, of Winchester, Clark County, Kentucky hereby make, constitute and appoint my wife, **BEVERLY M. WELLNER**, as my true and lawful Attorney-in-Fact for me and in my name, place and stead:

1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said wife in her discretion, with full power to retain the same without liability for loss or depreciation thereof.

2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).

3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.

4. To, make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation

to both real and personal property, including stocks, bonds, and insurance.

5. To have access to my safe deposit boxes, act as my proxy with power of substitution to vote all stocks or securities in my name in relation to any individual or corporate action, to deposit any stocks or securities in connection with any plans of prospective or reorganization committees, to accept and exercise all rights, to subscribe for securities and to sell same.

6. To receive and receipt for all rents and income to which I am or may become entitled, pay therefrom all necessary expenses for the maintenance, upkeep, care and protection of my property, deduct therefrom her own reasonable compensation, and pay the net income from time to time to me or in such manner as I shall direct, or in the absence of such payment to me or at my discretion, to invest the same for me in her judgment in the manner above described.

7. To prepare, execute and file federal or state income tax returns and other real and personal property tax lists and to pay all such taxes.

8. In the event of my illness, incapacity or other emergency to have full power to make all health care decisions for me and in my stead; this power shall encompass the power to make any decision which I might myself make in authorizing or refusing treatment, surgery or other health care. My Attorney-in-Fact shall have the right to refuse the administration of nutrition and hydration.

9. If I should ever need a guardian or curator or similar person or entity to assist me if I am unable to fully handle all of my affairs, and if this Power of Attorney should not be sufficient therefor, I nominate my wife, **BEVERLY M. WELLNER**, as my guardi-

an, curator, etc., and I specifically provide that surety not be required on her bond as such.

10. I hereby further grant unto my Attorney-in-Fact full power in and concerning the above premises and to do any and all acts as set forth above as fully as I could do if I were personally present, and at my decease to pay, transfer and deliver over to my personal representative, all principal and income then in his possession and control, and I do ratify and confirm whatever my said Attorney-in-Fact shall lawfully do under these presents, provided however, that my attorney shall not bind me as surety, guarantor for accommodation nor give away any of my estate, whatsoever, nor shall my attorney be authorized to accept service of process for or on my behalf.

This Power of Attorney shall become effective immediately and shall not be affected by my disability, this provision being pursuant to KRS 386.093.

A photo copy or other mechanical duplication of this instrument shall have the same effect as an original.

I revoke all prior General Powers of Attorney that I may have executed and I retain the right to revoke or amend this Durable Power of Attorney and to execute a new Durable Power of Attorney, assuming that I have the capacity to do so. Any amendments to this Power of Attorney shall be made by me in writing.

IN WITNESS WHEREOF, I have hereunto set my hand and signature on this the 15th day of May, 2008.

WITNESS TO SIGNATURE BY MARK

/s/_____ **JOE PAUL** His /s Mark **WELLNER**

/s/_____

STATE OF KENTUCKY)

) s.s.

COUNTY OF CLARK)

I, a notary public in and for the State and County aforesaid, do hereby certify that the foregoing Power of Attorney was produced and executed before me by **JOE PAUL WELLNER** who is personally known to me, and was acknowledged by him in my presence on this the 15th day of May, 2008 to be his voluntary act and deed.

My commission expires March 31, 2012.

/s/ Ashley B. Holley
NOTARY PUBLIC
STATE OF KENTUCKY AT LARGE

Prepared by:

/s/Michael A. Rowady
MICHAEL A. ROWADY, ESQ.
Blair & Rowady, P.S.C.
212 South Maple Street
Winchester, Kentucky 40391
(859) 744-3251

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY (OPTIONAL)

I. ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT PROVISIONS

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be subdued to alternative dispute resolution as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as

expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney In Fact, his or her agent(s) or any person whose claim is derived though or on behalf of the resident.

C. The "Claimant" may be either the Facility or the Resident, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)".

D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration. services. The Request for ADR shall be made in writing and may be submitted to the National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371, facsimile (952) 345-1160 www.adrforum.com (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select NAF or, if NAF is unwilling or unable to serve as the

Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively "NAF Rules of Procedure"). A copy of the Rules of the Dispute Resolution Process may be obtained from the Facility's Executive Director, or from NAF at the address or website listed above.

E. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by the Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the Request for ADR and is not presented in the arbitration hearing.

F. The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility by mediation. Unless the parties agree otherwise, the mediator will be selected as described in the NAF Mediation Rules. The mediation shall convene not later than 120 days after the Request is received by the Administrator. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with this Agreement. Unless the parties agree otherwise, the Arbitrator(s) shall be selected as described in the NAF Code of Procedure. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation. Claims where the demand is less than $75,000 shall not be subject to mediation and shall proceed directly to ar-

bitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith. The parties, at their own expense, may be represented by an attorney at the mediation or arbitration.

G. The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with the Supplemental Disclosures for Kindred Mediations ("Supplemental Disclosures"). Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved by the mediator. A copy of the Supplemental Disclosures may be obtained from the Facility's Executive Director or from NAF at the address or website listed in Paragraph D of this Agreement.

H. Cost of ADR. Facility shall pay the mediator's fees and other reasonable costs (excluding resident's attorney's fees) associated with the mediation. Facility shall pay the Arbitrator(s)' fees and other reasonable costs associated with the arbitration (excluding resident's attorney's fees) up to a maximum of five (5) days of hearing. If the arbitration hearing exceeds five (5) days, the additional fees and costs shall be borne equally by the parties.

I. The losing party must pay the award to the prevailing party within thirty (30) days of the award date. If the award is not timely paid, the prevailing party may bring legal action pursuant to KRS 417.150 to enforce the award as if ft were a judgment entered by a court.

J. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties here-

by make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.

K. The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. The Resident, or his or her legal guardian, his or her agent or designated legal representative understand that other local nursing home's agreements may not contain an alternative dispute resolution provision. The parties agree that the cost-effectiveness, time-efficiency and public policy reasons stated above are proper consideration for the acceptance of the Agreement.

II. ATTORNEY FEES AND COSTS

The parties to this Agreement expressly agree to bear their own attorney fees and costs incurred in relation to this Agreement, or in relation to any other claim, including a claim to collect on unpaid nursing home charges.

III. SEVERABILITY PROVISION

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining

provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

IV. RESIDENT'S UNDERSTANDING OF AGREEMENT

The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by providing notice to the Facility from the Resident within thirty (30) days of signature. If not revoked within thirty (30) days, this Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility. (D) Nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency. The Resident, his or her agent or designated legal representative, also had the opportunity to consult with a Facility representative regarding such explanations or clarification.

Olive Clark	0280 Winchester Centre for Health & Rehabilitation
Print Name of Resident	Print Name and Number of Facility

/s/ Jan Clark POA
Signature of Resident or Legal Representative

/s/
Signature of Title of Facility's Authorized Agent

Jan Clark, Daughter (Financial Agent)
Legal Representative Printed Name and Capacity (i.e., guardian, durable power of attorney, spouse, son, daughter, etc.)

/s/
Printed Name of Facility's Authorized Agent

Date: 8/15/08

Date: 8/15/08

If signed by a Legal Representative, the representative certifies that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the resident.

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY (OPTIONAL)

I. ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT PROVISIONS

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be subdued to alternative dispute resolution as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement Informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as

expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney in Fact, his or her agent(s) or any person whose claim is derived through or on behalf of the resident.

C. The "Claimant" may be either the Facility or the Resident, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)".

D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration services. The Request for ADR shall be made in writing and may be submitted to the National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371, facsimile (952) 345-1160 www.adrforum.com (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select NAF or, if NAF is unwilling or unable to serve as the

Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively "NAF Rules of Procedure"). A copy of the Rules of the Dispute Resolution Process may be obtained from the Facility's Executive Director, or from NAF at the address or website listed above.

E. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by the Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the Request for ADR and is not presented in the arbitration hearing.

F. The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility by mediation. Unless the parties agree otherwise, the mediator will be selected as described in the NAF Mediation Rules. The mediation shall convene not later than 120 days after the Request is received by the Administrator. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with this Agreement. Unless the parties agree otherwise, the Arbitrator(s) shall be selected as described in the NAF Code of Procedure. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation. Claims where the demand is less than $75,000 shall not be subject to mediation and shall proceed directly to ar-

bitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith. The parties, at their own expense, may be represented by an attorney at the mediation or arbitration.

G. The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with the Supplemental Disclosures for Kindred Mediations ("Supplemental Disclosures"). Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved by the mediator. A copy of the Supplemental Disclosures may be obtained from the Facility's Executive Director or from NAF at the address or website listed in Paragraph D of this Agreement.

H. Cost of ADR. Facility shall pay the mediator's fees and other reasonable costs (excluding resident's attorney's fees) associated with the mediation. Facility shall pay the Arbitrator(s)' fees and other reasonable costs associated with the arbitration (excluding resident's attorney's fees) up to a maximum of five (5) days of hearing. If the arbitration hearing exceeds five (5) days, the additional fees and costs shall be borne equally by the parties.

I. The losing party must pay the award to the prevailing party within thirty (30) days of the award date. If the award is not timely paid, the prevailing party may bring legal action pursuant to KRS 417.150 to enforce the award as if it were a judgment entered by a court.

J. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties here-

by make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.

K. The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. The Resident, or his or her legal guardian, his or her agent or designated legal representative understand that other local nursing home's agreements may not contain an alternative dispute resolution provision. The parties agree that the cost-effectiveness, time- efficiency and public policy reasons stated above are proper consideration for the acceptance of the Agreement.

II. ATTORNEY FEES AND COSTS

The parties to this Agreement expressly agree to bear their own attorney fees and costs incurred in relation to this Agreement, or in relation to any other claim, including a claim to collect on unpaid nursing home charges.

III. SEVERABILITY PROVISION

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining

provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

IV. RESIDENTS UNDERSTANDING OF AGREEMENT

The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by providing notice to the Facility from the Resident within thirty (30) days of signature. If not revoked within thirty (30) days, this Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility. (D) Nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency. The Resident, his or her agent or designated legal representative, also had the opportunity to consult with a Facility representative regarding such explanations or clarification.

Joe Wellner	0280 Winchester Centre for Health & Rehabilitation
/s/	
Print Name of Resident	Print Name and Number of Facility

_____	/s/ _____
Signature of Resident or Legal Representative	Signature of Title of Facility's Authorized Agent
Beverly Wellner, Spouse (Financial Agent)	/s/
Legal Representative Printed Name and Capacity (i.e., guardian, durable power of attorney, spouse, son, daughter, etc.)	Printed Name of Facility's Authorized Agent
Date: 8/16/08	Date: 8/16/08

If signed by a Legal Representative, the representative certifies that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the resident.

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION

MOVANTS/PETITIONERS

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002213-I

PETITION FOR REHEARING

Submitted by:
Quintairos, Prito, Wood & Boyer, P.A.

/s/_____
Donald L. Miller, II
Peter Cassidy, III
Kristin M. Lomond

9300 Shelbyville Road, Suite 400
Louisville, KY 40222
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, RM. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 4›..; on this 12th day of October, 2015.

/s/ _____
Counsel for Petitioners

PETITION FOR REHEARING

The majority Opinion sidestepped the Federal Arbitration Act, the Supremacy Clause and misinterpreted controlling decisions of the U.S. Supreme Court. A power of attorney cannot constitutionally permit formation of one type of contract but not an arbitration contract. The Court should correct the majority's error. Civil Rule 76.32 governs petitions for rehearing and states in part, "[A] petition for re-

hearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto."[1]

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby." U.S. CONST., Art. VI, c1.2. Therefore, a "state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As federal substantive law, the Federal Arbitration Act ("FAA") preempts all contrary or inconsistent state law. See *ATT Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011). The majority here agreed the FAA applied to govern the arbitration agreements at issue:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ...

---

[1] This closely decided (4-3) decision sets new Kentucky precedent, and Petitioners agree with the dissent that it overtly conflicts with federal and state court decisions interpreting and applying the FAA to Kentucky arbitration law. Since oral arguments were held in this case on December 12, 2013, almost two years ago now, even this Court's membership has changed. Petitioners respect the Court's considered debate, and given such a close decision with such huge implications for Kentucky law, encourage the Court strongly to consider rehearing in this case.

> or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). *See also, Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309 at *8 (Ky. Sept. 24, 2015). Nevertheless, it failed to apply the FAA. The Court's Opinion is attached as Appendix 1.

The majority Opinion's newly-created rule of law disfavoring enforcement of agent-executed arbitration agreements cannot stand in light of the FAA. To require more to enforce an arbitration contract signed by an agent than for any other contract signed by an agent disproportionately impacts arbitration and is preempted by the FAA.

Ms. Clark expressly granted to her attorney-in-fact the power to make and sign "any and all contracts or agreements," without qualification. She also granted her the authority, "in her sole discretion, to transact, handle and dispose of all matters affecting me and/or my estate in any possible way." *See* General Durable Power of Attorney, attached as Appendix 2 (emphasis added). The majority requires for enforcement a redundancy that would require correction in a grammar class. By fiat, the majority vitiates Ms. Clark's express grant of power and deems it to be a "vague and general delegation of authority." See *Whisman*, 2015 WL 563430 at *16. The majority also characterized an arbitration contract – a contract to agree upon the forum for resolution of her claims – as one waiving the "inviolate," "sacred," and "God-given right" to a jury trial. *Id.*

The majority opinion radically misses the mark because it derives from an incorrect assumption concerning the United States' form of government. Whether characterized as a "Constitutional Democracy" where the majority rules, *see Smith v. Allwright,* 321 U.S. 649, 664 (U.S. 1944), or a "Constitutional Republic" where the people are sovereign, *see Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793)(superseded by statute in holding), its founders built the United States as a nation of laws. Indeed, when the majority's members took their places on this Court each took an oath to "*support* the Constitution of the United States and the Constitution of this Commonwealth." Kentucky Constitution § 228 (emphasis added). The majority did not comply with this oath. As Justice Thurgood Marshall stated:

> Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2 .... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 fn 9 (1987) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984)(emphasis original)).

The majority's Opinion does not support the U.S. or Kentucky Constitutions. A jury trial is absolutely not a "God-given" right, but rather a right provided under the terms and conditions of a constitution written and adopted by its people. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* CR 38.04. *See also, Brown v. Hoblitzell*, 307 S.W.2d 739 (Ky. 1956). Regardless, the majority probably invalidated countless arbitration contracts signed by agents under powers of attorney for mobile phone service, cable television, credit cards, loans, etc., without even considering *those* ramifications, because it so detests the agreements in the nursing home context.[2] A result-oriented law is not faithful to any constitution.

Highlighting the majority Opinion's error is its failure to recognize – or to distinguish – that courts

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[2] As the Court is well aware, arbitration clauses appear in a myriad of contracts involving a host of goods and services. *See, e.g., Green Tree Fin. Corp. v.* Baizle, 539 U.S. 444 (2003)(home improvement loan); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (commercial debt restructuring contract); *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001)(employment contract); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (longshoreman collective bargaining contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)(securities brokerage contract); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)(termite control contract); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(paint manufacturing and sales agreement). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, inc. 473 U.S. 614 (1985)(automobile manufacturing and sales distribution contract).

and legislatures can indeed set higher standards for parental rights, slavery and marriage to name a few (*see, e.g.*, KRS 625.090; KY Const. § 25; and KRS 402.050) because no federal law prohibits those elevated standards. The majority simply ignores that the FAA does prohibit higher standards for arbitration contracts as compared to others. The majority's dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted.

I. THE MAJORITY OVERLOOKED AND IGNORED THE FAA AS THE CONTROLLING STATUTE AND MISCONSTRUED CONTROLLING DECISIONS INTERPRETING IT

The Federal Arbitration Act ("FAA") expressly protects both pre-and post-dispute arbitration contracts, including those used in long-term care facilities like the one at issue here. See 9 U.S.C. § 2. *See also, Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201 (2012) (applying the FAA in nursing home context).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011), the U.S. Supreme Court held that the FAA means exactly what it says: agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, 131 S.Ct. at 1745 (quoting 9 U.S.C. § 2). Arbitration is a matter of contract and courts must treat arbitration contracts "on an equal footing with other contracts" and enforce them to their terms. *Id.* at 1745. The FAA not only preempts state laws that expressly disfavor arbitration agreements but it also preempts state-law rules that purport to apply to all contracts equally but actually "have a **dispropor-**

tionate impact on arbitration agreements." See *Id.* at 1747 (emphasis added). The majority's Opinion does both, and the FAA preempts its rule of law.

Regardless of the majority's intent, its Opinion discriminates against arbitration contracts, isolating them as forgoing a "God-given" right. That violates the FAA. The FAA preempts all generally applicable contract defenses – as this Court crafted its rule here – that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). **But the inquiry becomes more complex when a doctrine normally thought to be generally applicable**, such as duress or, as relevant here, unconscionability, **is alleged to have been applied in a fashion that disfavors arbitration.** In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "at law or in equity for the revocation of any contract." *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted).

Concepcion, 131 S.Ct. at 1747 (bold emphasis added).

The majority Opinion found Ms. Clark's POA granted to her agent the authority to enter into the arbitration agreement. That should have ended the discussion. But the majority then took its analysis one step further and held that the arbitration con-

tract *itself* required a higher standard for enforcement than other contracts:

> One might entertain considerable doubt about whether Olive consciously intended to forfeit her right of access to the courts and to a jury trial, but the language of her POA encompasses that result regardless of Olive's actual intent. Given this extremely broad, universal delegation of authority, **it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered.**
>
> ...
>
> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.**

Whisman, 2015 WL 5634309 at *14-*15 (emphasis added). The majority's Opinion simply violates the FAA and the Supremacy Clause.

The FAA does not prohibit a person from denying her attorney-in-fact the power to sign arbitration contracts. The principal retains the prerogative to limit an agent's authority under the POA as she sees fit. *See, e.g., Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d 581, 591-92 (Ky. 2012)("Although the statute allows durable powers of attorney to be created, it does not address what authority may be granted therein. The scope of that authority is thus left to the principal to declare"). However, the FAA abso-

lutely prohibits a court or state legislature from doing what Ms. Clark herself did *not* do: making rules to inhibit enforcement of arbitration contracts signed by her agent, as distinguished from all other contracts signed by her agent. Stated otherwise, the FAA prohibits courts from interpreting a POA providing the "right to contract," or a similar proxy, to authorize the formation of one type of contract but not a contract for arbitration. *See, e.g., GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174 (E.D.Ky., Aug. 7, 2013) (copy attached as Appendix 3).

Here, the majority refused to enforce a valid arbitration contract by *inferring* that Ms. Clark *might* have limited her attorney-in-fact's express power "to sign any and all contracts" because this particular contract contained an arbitration clause, which by definition waives her right to jury trial. *Whisman*, 2015 WL 5634309 at *14-*15. Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one. That law flagrantly offends the FAA. Yet, the majority held agent-executed arbitration contracts in Kentucky shall require more for enforcement than all other agent-executed contracts. *Id.* at *17. *Compare, Taulbee, supra.*[3]

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[3] "An arbitration agreement is a contract. The power of attorney must be read in accordance with its express terms and in light of the strong federal policy favoring arbitration.... Taulbee's arguments that arbitration agreements are different and require more than the general power to contract for authorization to execute one are of no help to her. That line of reasoning would

II. THE MAJORITY OPINION MISAPPLIED THE APPLICABLE LAW

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements" that had "manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, 1747 (2011)(quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Here, the majority attempted to avoid U.S. Supreme Court precedent by characterizing its rule as one of general agency law and denying any specific arbitration discrimination:

> We reject the notion that this holding conflicts with the decisions of the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, - U.S. - , 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), and *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).... To the contrary, our holding does not prohibit arbitration of any "particular type of claim." .... A straight-forward application of our rule that an attorney-in-fact cannot act beyond the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occa-

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simply result in preemption of such a requirement under the FAA." 2013 WL 4041174 at *9 (emphasis added).

> sions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

Whisman, 2015 WL 5634309 at *17-*18 (footnote omitted).

The majority apparently misreads or misconceives *Concepcion's* and *Marmet Health's* holdings. While *Concepcion* held that prohibiting a particular claim violated the FAA, it also held that "a doctrine normally thought to be generally applicable" can violate the FAA if applied in a fashion to disfavor arbitration. *See Concepcion*, 131 S. Ct. at 1747. This Court previously rejected a similar attempted distinction in a commercial context, in *Schnuerle v. Insight Commc'ns Co.*, L.P., 376 S.W.3d 561, 577 (Ky. 2012):

> [O]ur state Constitution and statutes favor the enforceability of arbitration agreements. Moreover, the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, [citation omitted] (1991). The FAA's provisions "manifest a liberal federal policy favoring arbitration agreements.' " *Id.* at 25, 111 S.Ct. 1647 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, [citation omitted] (1983)). The Supreme Court has

> "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, [citation omitted] (2000) (quoting *Rodriguez de Quijas v. Shearson/AM. Express, Inc.*, 490 U.S. 477, 481 [citation omitted] (1989)); *Jenkins*, 400 F.3d at 874. In light of such long-standing public policy, we see no basis to disturb this contractual term. (Emphasis added.)

The majority ignored its own precedent because of the context of this arbitration agreement. Commercial contract cases often invoke the right to jury trial just like a medical negligence case.

Holding the express power to "make and sign any and all contracts," Ms. Clark's attorney-in-fact could have (most likely, did) enter into enforceable contracts for a variety of reasons, such as for banking rights, property purchases, or even to admit her mother to a hospital. Nevertheless, the majority held that the contract she signed to arbitrate her mother's claims – a choice of forum contract with absolutely no substantive implications to her right to seek redress for claims – cannot be enforced because the POA document did not include ***redundant*** language to sign an "***arbitration contract,***" or even, "to waive her constitutional right to jury trial."[4]

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[4] The dissent explained the error in this comparison logic: "The difference between arbitration and the majority's parade of horribles is obvious. Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal

"The 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (*citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). While the §2 savings clause preserves applicable common law contract defenses, the *Concepcion* Court warned that the grounds available under §2 must not be construed to include a state's policy preference for procedures incompatible with arbitration. "[N]othing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. 1740, 1748 (citations omitted).

Federal law requires the Court to "stretch" to find ways to enforce arbitration contracts. The majority reclassified "arbitration contracts" not as mere contracts but as a principal's "waiver of his constitutional right to access the courts and to trial by jury." See *Whisman*, 2015 WL 5634309, at *17. The result mandates discriminatory enforcement for agent-entered arbitration contracts as compared with all other agent-entered contracts: an agent's power "to

substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA. *Southland Corp. v. Keating*, 465 U.S. at 14, 104 S. Ct. 852 (discussing Congress's intent to counteract "common law hostility toward arbitration")." *Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309, at *35 (Ky. Sept. 24, 2015).

sign contracts" is now insufficient to enter into arbitration contracts, rendering arbitration contracts - alone – unenforceable absent additional language not required for enforcement of all other agent-entered contracts. That result is preempted by the FAA. [5]

[5] The FAA also preempts Kentucky's interpretation of an arbitration agreement's enforceability as against wrongful death claim beneficiaries. In *Marmet Health Care Center*, 565 U.S. __, 132 S.Ct. 1201, 1202-03 (2012), the U.S. Supreme Court held that the FAA preempted categorical exemptions of cases from arbitration. No legitimate distinction exists between West Virginia's "policy-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims and Kentucky's judicially made "contract-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims. Several cases await decisions on petitions for discretionary review, conclusively demonstrating the constitutional impermissibility of allowing many (perhaps all) contracts affecting beneficiaries or other non-parties to the contract – but isolating arbitration agreements as an outcast.

III. CONCLUSION

Here the Court has no choice but to grant rehearing and correct its plain error.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

/s/_____
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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION
MOVANTS/PETITIONERS

v.

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002212-I

PETITION FOR REHEARING

Submitted by:

Quintairos, Prieto, Wood & Boyer,P.A.

/s/

J. Peter Cassidy, III
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Louisville, KY 40222
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stoldey Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 12th day of October, 2015.

/s/
Counsel For Petitioners

PETITION FOR REHEARING

The majority Opinion sidestepped the Federal Arbitration Act, the Supremacy Clause and misinterpreted controlling decisions of the U.S. Supreme Court. A power of attorney cannot constitutionally permit formation of one type of contract but not an

arbitration contract. The Court should correct the majority's error. Civil Rule 76.32 governs petitions for rehearing and states in part, "[A] petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto."[1]

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby." U.S. CONST., Art. VI, c1.2. Therefore, a "state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As federal substantive law, the Federal Arbitration Act ("FAA") preempts all contrary or inconsistent state law. *See ATT Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011). The majority here agreed the FAA applied to govern the arbitration agreements at issue:

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> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). *See also, Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309 at *8 (Ky. Sept. 24, 2015). Nevertheless, it failed to apply the FAA. The Court's Opinion is attached as Appendix 1.

The majority Opinion's newly-created rule of law disfavoring enforcement of agent-executed arbitration agreements cannot stand in light of the FAA. To require more to enforce an arbitration contract signed by an agent than for any other contract signed by an agent disproportionately impacts arbitration and is preempted by the FAA.

Mr. Wellner expressly granted to his attorney-in-fact the power to make, execute and deliver "contracts of every nature in relation to both real and personal property," without qualification. *See* Power of Attorney of Joe Paul Wellner, attached as Appx. 2. The Court agreed that personal injury claims constitute "personal property" under Kentucky law. *See Whisman*, 2015 WL 563430 at *13. The majority then characterized the arbitration contract — a contract to agree on a forum for resolving his personal injury claims – as a contract not relating to personal property (e.g., where to resolve the claims) but, instead, "to relinquish his constitutional rights," which

are "decisively *not* 'personal property.'" *Id.* (emphasis original). By fiat, the majority vitiates Mr. Wellner's express grant of power and removes "arbitration contracts" from the genre of all other contracts relating to Mr. Wellner's personal property. *Id.* Moreover, following the majority's logic, his attorney-in-fact could unilaterally release Mr. Wellner's personal injury claim but could not choose to litigate that claim in an arbitral forum.

The majority opinion radically misses the mark because it derives from an incorrect assumption concerning the United States' form of government. Whether characterized as a "Constitutional Democracy" where the majority rules, *see Smith v. Alfright*, 321 U.S. 649, 664 (U.S. 1944), or a "Constitutional Republic" where the people are sovereign, *see Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)(superseded by statute in holding), its founders built the United States as a nation of laws. Indeed, when the majority's members took their places on this Court each took an oath to "*support* the Constitution of the United States and the Constitution of this Commonwealth." Kentucky Constitution § 228 (emphasis added). The majority did not comply with this oath. As Justice Thurgood Marshall stated:

> Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2 .... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe

> that agreement in a mariner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 fn 9 (1987) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984)(emphasis original)).

The majority's Opinion does not support the U.S. or Kentucky Constitutions. A jury trial is absolutely not a "God-given" right, but rather a right provided under the terms and conditions of a constitution written and adopted by its people. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* CR 38.04. *See also*, *Brown v. Hobitzell*, 307 SW2d 739 (Ky. 1956). Regardless, the majority probably invalidated countless arbitration contracts signed by agents under powers of attorney for mobile phone service, cable television, credit cards, loans, etc., without even considering *those* ramifications, because it so detests the agreements in the nursing home context.[2] A result-oriented law is not faithful to any constitution.

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[2] As the Court is well aware, arbitration clauses appear in a myriad of contracts involving a host of goods and services. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)(home improvement loan); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (commercial debt restructuring contract); *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001)(employment con-

Highlighting the majority Opinion's error is its failure to recognize – or to distinguish – that courts and legislatures can indeed set higher standards for parental rights, slavery and marriage to name a few (*see, e.g.*, KRS 625.090; KY Const. § 25; and KRS 402.050) because no federal law prohibits those elevated standards. The majority simply ignores that the FAA does prohibit higher standards for arbitration contracts as compared to others. The majority's dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted.

I. THE MAJORITY OVERLOOKED AND IGNORED THE FAA AS THE CONTROLLING STATUTE AND MISCONSTRUED CONTROLLING DECISIONS INTERPRETING IT

The Federal Arbitration Act ("FAA") expressly protects both pre-and post-dispute arbitration contracts, including those used in long-term care facilities like the one at issue here. *See* 9 U.S.C. § 2. *See also, Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201 (2012) (applying the FAA in nursing home context).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011), the U.S. Supreme Court held that the FAA means exactly what it says:

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tract); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (longshoreman collective bargaining contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)(securities brokerage contract); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)(termite control contract); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(paint manufacturing and sales agreement). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, inc. 473 U.S. 614 (1985)(automobile manufacturing and sales distribution contract).

agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, 131 S.Ct. at 1745 (quoting 9 U.S.C. § 2). Arbitration is a matter of contract and courts must treat arbitration contracts "on an equal footing with other contracts" and enforce them to their terms. Id. at 1745. The FAA not only preempts state laws that expressly disfavor arbitration agreements but it also preempts state-law rules that purport to apply to all contracts equally but actually "have a **disproportionate impact** on arbitration agreements." *See id.* at 1747 (emphasis added). The majority's Opinion does both, and the FAA preempts its rule of law.

Regardless of the majority's intent, its Opinion discriminates against arbitration contracts, isolating them as forgoing a "God-given" right. That violates the FAA. The FAA preempts all generally applicable contract defenses – as this Court crafted its rule here -- that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). **But the inquiry becomes more complex when a doctrine normally thought to be generally applicable**, such as duress or, as relevant here, unconscionability, **is alleged to have been applied in a fashion that disfavors arbitration**. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive

> effect might extend even to grounds traditionally thought to exist " 'at law or in equity for the revocation of any contract.' " *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted).

Concepcion, 131 S.Ct. at 1747 (bold emphasis added).

The majority found Mr. Wellner's personal injury claim constituted personal property, and his attorney-in-fact had the authority to make contracts relating to his personal property. *See Whisman*, 2015 WL 5634309 at *13. In other words, Ms. Wellner could make contracts to release his personal injury claims. The arbitration contract concerns the forum to resolve Mr. Wellner's claims, nothing more substantive. But the majority then took its analysis one step further and held that the arbitration contract itself required a higher standard for <u>enforcement</u> than other contracts:

> Beverly's authority to deal with Joe's real and personal property does not translate into the power to relinquish his constitutional rights. Consequently, we conclude that Beverly was not authorized to provide Joe's assent to an agreement waiving his constitutional rights ***by committing his future personal injury claims to arbitration.***

Whisman, 2015 WL 5634309 at *13 (emphasis added). The majority's Opinion simply violates the FAA and the Supremacy Clause.

The FAA does not prohibit a person from denying his attorney-in-fact the power to sign arbitration contracts. The principal retains the prerogative to limit an agent's authority under the POA as he sees fit. *See, e.g., Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d 581, 591-92 (Ky. 2012)("Although the statute al-

lows durable powers of attorney to be created, it does not address what authority may be granted therein. The scope of that authority is thus left to the principal to declare"). However, the FAA absolutely prohibits a court or state legislature from doing what Mr. Wellner himself did not do: making rules to inhibit enforcement of arbitration contracts signed by his agent, as distinguished from all other "contracts of every nature relating to personal property" signed by his agent. Stated otherwise, the FAA prohibits courts from interpreting a POA providing the "right to contract," or a similar proxy, to authorize the formation of one type of contract but not a contract for arbitration. *See, e.g., GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174 (E.D.Ky., Aug. 7, 2013) (copy attached as Appendix 3).

Here, the majority refused to enforce a valid arbitration contract. Even though Mr. Wellner expressly granted his attorney-in-fact the power "to sign contracts of every nature in relation to personal property," this particular contract contained an arbitration clause – which by the majority's new definition transformed a choice of forum contract (for resolving his personal injury claims) into a contract waiving constitutional rights. *Whisman*, 2015 WL 5634309 at *13. Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one. That law flagrantly offends the FAA. Yet, the majority held agent-executed arbitration contracts in Kentucky shall require more for

enforcement than all other agent-executed contracts. *Id.* at *17. *Compare, Taulbee, supra.*[3]

II. THE MAJORITY OPINION MISAPPLIED THE APPLICABLE LAW

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements" that had "manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, 1747 (2011)(quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 217 F.2d 402, 406 (2d Cir. 1959)). Here, the majority attempted to avoid U.S. Supreme Court precedent by characterizing its rule as one of general agency law and denying any specific arbitration discrimination:

> We reject the notion that this holding conflicts with the decisions of the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, - U.S. - , 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), and *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).... To the contrary, our holding does not prohibit arbitration of any "particular type of claim." ....
> A straight-forward application of our rule that an attorney-in-fact cannot act beyond

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[3] "An arbitration agreement is a contract. The power of attorney must be read in accordance with its express terms and in light of the strong federal policy favoring arbitration.... Taulbee's arguments that arbitration agreements are different and require more than the general power to contract for authorization to execute one are of no help to her. That line of reasoning would simply result in preemption of such a requirement under the FAA." 2013 WL 4041174 at *9 (emphasis added).

> the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occasions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

Whisman, 2015 WL 5634309 at *17-*18 (footnote omitted).

The majority apparently misreads or misconceives *Concepcion's* and *Marmet Health's* holdings. While Concepcion held that prohibiting a particular claim violated the FAA, it also held that "a doctrine normally thought to be generally applicable" can violate the FAA if applied in a fashion to disfavor arbitration. *See Concepcion*, 131 S. Ct. at 1747. This Court previously rejected a similar attempted distinction in a commercial context, in *Schnuerle v. Insight Commc'ns Co., LP.*, 376 S.W.3d 561, 577 (Ky. 2012):

> [O]ur state Constitution and statutes favor the enforceability of arbitration agreements. Moreover, the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other

> contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, [citation omitted] (1991). The FAA's provisions "manifest a liberal federal policy favoring arbitration agreements.' " *Id.* at 25, 111 S.Ct. 1647 (quoting *Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, [citation omitted] (1983)). **The Supreme Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' "** *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, [citation omitted] (2000) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 [citation omitted] (1989)); *Jenkins*, 400 F.3d at 874. In light of such longstanding public policy, we see no basis to disturb this contractual term. (Emphasis added.)

The majority ignored its own precedent because of the context of this arbitration agreement. Commercial contract cases often invoke the right to jury trial just like a medical negligence case.

Holding the express power to "make contracts of every nature in relation to personal property," Mr. Wellner's attorney-in-fact could have (most likely, did) enter into enforceable contracts for a variety of reasons, such as for banking, purchases, or even to admit her husband to a hospital. Nevertheless, the majority held that the contract she signed to arbitrate her husband's claims – a choice of forum contract with absolutely no substantive implications to his right to seek redress for claims – cannot be en-

forced because the POA document did not include ***redundant*** language to sign an "***arbitration*** contract," or even, "to waive his constitutional right to jury trial."[4]

"The 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). While the §2 savings clause preserves applicable common law contract defenses, the *Concepcion* Court warned that the grounds available under §2 must not be construed to include a state's policy preference for procedures incompatible with arbitration. "'Nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. 1740, 1748 (citations omitted).

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[4] The dissent explained the error in this comparison logic: "The difference between arbitration and the majority's parade of horribles is obvious. Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA. *Southland Corp. v. Keating*, 465 U.S. at 14, 104 S.Ct. 852 (discussing Congress's intent to counteract "common law hostility toward arbitration")." *Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309, at *35 (Ky. Sept. 24, 2015).

Federal law requires the Court to "stretch" to find ways to enforce arbitration contracts. The majority reclassified "arbitration contracts" not as mere contracts but as a principal's "waiver of his constitutional right to access the courts and to trial by jury." *See Whisman*, 2015 WL 5634309, at *17. The result mandates discriminatory enforcement for agent-entered arbitration contracts as compared with all other agent-entered contracts: an agent's power "to sign contracts" is now insufficient to enter into arbitration contracts, rendering arbitration contracts — alone -- unenforceable absent additional language not required for enforcement of all other agent-entered contracts. That result is preempted by the FAA.[5]

III. CONCLUSION

Here the Court has no choice but to grant rehearing and correct its plain error.

Respectfully submitted,

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[5] The FAA also preempts Kentucky's interpretation of an arbitration agreement's enforceability as against wrongful death claim beneficiaries. In *Marmet Health Care Center*, 565 U.S. __, 132 S.Ct. 1201, 1202-03 (2012), the U.S. Supreme Court held that the FAA preempted categorical exemptions of cases from arbitration. No legitimate distinction exists between West Virginia's "policy-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims and Kentucky's judicially made "contract-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims. Several cases await decisions on petitions for discretionary review, conclusively demonstrating the constitutional impermissibility of allowing many (perhaps all) contracts affecting beneficiaries or other non-parties to the contract – but isolating arbitration agreements as an outcast.

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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-1

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH & REHABILITATION
PETITIONERS

v.

JANIS E. CLARK, Executrix Of The Estate Of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK, deceased
RESPONDENT

RESPONSE TO PETITION FOR REHEARING

Submitted By:

/s/

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CERTIFICATE OF SERVICE

I certify that this petition was served upon Donald L. Miller, II, Esq.; J. Peter Cassidy, III, Esq.; Kristin M. Lomond, Esq.; Quintairos, Prieto, Wood & Boyer, P.A.; 9300 Shelbyville Road, Suite 400; Louisville, KY 40222; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 23rd day of October, 2015.

/s/
Counsel for Respondent

RESPONSE

The material and procedural facts, controlling law, and jurisdictional basis have not changed. This response to petition is filed pursuant to CR 76.32, which provides in part:

(1) When authorized.

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(b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appea' and will be granted only when it appears that the court has overlooked a ***material fact*** in the record, or a ***controlling statute or decision***, or has ***misconceived the issues presented*** on the appeal or the law applicable thereto.

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I. Petitioners Do Not Offer A Sufficient Justification For Rehearing.

Petitioners provide this Court with no basis upon which to justify a rehearing. The facts were not in dispute in this case. There have been no facts arising since the Opinion issued to affect its conclusions. Neither the parties nor the Court overlooked either a controlling decision or statute. The Supreme Court's analyses of the issues, including the analyses of the Dissents, were lengthy. Petitioners go on to argue in effect however, that this Court "has misconceived the issues presented on appeal or the law applicable thereto." Not so. Whether or not the Court's Opinion is correct (and it is), the Court certainly perceived all the issues squarely. A rehearing is not authorized in this instance under the Rule.

Petitioners obviously wish to re-argue to this Court, that the Court "got it wrong." Again, ***even if*** this represented a correct characterization—***and it does not***—such a proposition is not a legitimate basis upon which to hold a rehearing. Notwithstanding Petitioners' apparent dissatisfaction with the Opinion of this Court, this Court issued an exhaustive Opinion, in terms of both the Majority and Dissenting opinions, and, as such, it can be fairly said that the Court left no stone unturned in reaching its final result. And the decision was in fact correct.

II. The Supreme Court's Decision Correctly Interpreted Kentucky Agency And Power-Of-Attorney Law.

Whisman clarifies the law regarding Kentucky powers-of-attorney as they relate to pre dispute arbitration agreements entered into between parties. It extends interpretation of Kentucky's law from *Donna*

Ping v. Beverly Enterprises, Inc., 376 SW3d 581 (Ky. 2012), and sets out three teachings:

First, general power-of-attorney language purporting to grant agency authority to transact any and all business that a principal could do if in person, *i.e.*, a generic ***proxy*** power, is, by itself, ineffective to alter a fundamental right of the principal under Kentucky law, *e.g.*, promising forever to forego all litigation in civil courts, of future disputes, between a principal and an outside party. *See Pine Tree Villa, LLC v. Brooker*, 612 FedAppx 340, 344 (6th Cir. 2015) ("Kentucky law does not appear to provide for unlimited POAs."). That is, the latter transactions alter the principal's status in society, at least with respect to the other party to the agreement. These transactions would thus not normatively be foreseeable by the principal, and would not be seen to be encompassed by a general grant of authority without the appropriate specific language going thereto.

Second, the ***act*** of signing a pre-dispute arbitration agreement is qualitatively different from the act of instituting or participating in an arbitration, or of ordinary actions tending to property. A reviewing court must seek out the language for signing the agreement.

Third, the power to enter into the status-altering pre-dispute agreement to arbitrate all disputes between an outside party and a principal is not immanent in specific power-of-attorney ***language*** purporting to grant agency authority (1) over litigation; or (2) over contracts involving a principal's property. Tending to these matters does not cover the alteration of the principal's civil right to a jury

trial vis-à-vis disputes with a second party, potentially in perpetuity.

Just as important decisions which could be expressed in a power-of-attorney, *e.g.*, the ability to marry by proxy, or to cede parental rights, must have that authority set out; an agent waiving his principal's trial rights generally with respect to another party must be set out. *Whisman* could not be more clear regarding vague, general, "big tent" language in a power-of-attorney. It is insufficient to execute the agreement at bar. This is so because the power to modify the fundamental rights of a principal changes that principal's standing in society, *i.e.*, it affects the principal's status. It permanently alters the principal's access to the "King's justice," with respect to at least the other party to the arbitration agreement,[1] and cannot be inferred from an instrument without explicit address.

Given its enormity, mere creation of a power over the principal's legal affairs, to include litigation and the authority to file a law suit on behalf of the principal, is not sufficient. Many powers-of-attorney include language authorizing litigation. However, it does not follow from this that ***granting power to take a certain action*** intrinsically encompasses ***the power to promise never to take that action***. Disavowal (on the principal's behalf), potentially into perpetuity, by an agent of a power given him by the principal would constitute the agent stepping into the shoes of the principal in the ***creation*** of the agency, *i.e.*, unilaterally rewriting the power-of-attorney.

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[1] Including successors, assigns, affiliates, officers, employees, etc....

Creation of a power to execute contracts in relation to the principal's property is likewise not sufficient. This Court agreed that ***a law suit involving a dispute*** is a species of property, a "chose-in-action." However, the *gravamen* of the arbitration agreement acts not in relation to that property; the agreement acts primarily in relation to a fundamental civil right, vis-à-vis a second party.

It is sometimes pointed out that trial rights are easily waived, by the mere failure not to invoke them. But the dissimilarity here should be obvious. For an agent to transact with respect to, or disavow, a particular piece of property should obviously be small potatoes in a well-equipped power-of-attorney. For an agent to disavow the institution of property altogether, however, is entirely another matter.

II. The Court's Opinion Does Not Impinge Upon The FAA.

The U.S. Supreme Court, interpreting the FAA, has rejected numerous attempts by States to refuse to enforce arbitration contracts undoubtedly made, by virtue of their essential nature or their terms. That is not happening here.

The former point notwithstanding, the U.S. Supreme Court has never held that the FAA requires State agency law to bend to find authority to make such contracts where it otherwise would not be found. As U.S. Supreme Court Justice Clarence Thomas noted in his concurrence in *Concepcion*, *see infra*, "the FAA requires that an agreement to arbitrate be enforced ***unless*** a party successfully challenges the ***formation*** of the arbitration agreement." *AT&T Mobility, LLC v. Concepcion*, 131 SCt 1740, 1753 (2011). This identifies ***where*** the FAA begins

to apply. It intervenes once an arbitration agreement is formed pursuant to unbiased State law principles of interpretation (including those pertaining to authority), and not before. Where the FAA does not begin to apply, the States are unbounded except by their own self-governance... a self-governance that has a place for State judicial interpretation of State law.[2]

"A power of attorney cannot constitutionally permit formation of one type of contract but not an

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[2] Petitioners bring this Court's attention to *Chisholm v. Georgia*, 2 U.S. 419 (1793), but misread the case. In *Chisholm*, the U.S. Supreme Court denied that States possessed sovereign immunity (Justice Iredell dissenting), holding that all sovereignty was held by the people of the United States as an aggregate of sovereign individuals. It is commonly understood that the peoples of the United States clarified this error via the Eleventh Amendment (1795). Today, Dual Sovereignty is the accepted understanding of the American federal system. *See e.g., Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *see also* The Kentucky Resolution (1799); *Ware v. Hylton*, 3 US 199 (1796):

"In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."

Ware, 3 US at 224 (Opinion of Justice Chase). Finite authority is granted to the federal government through the U.S. Constitution and the laws promulgated therefrom; all other residual governing authority is retained by the States. U.S. Const. amend. X.

arbitration contract." (Petition at p. 1) The error in this statement should be obvious. Of course it can. To put it clearly and methodically: ***Courts*** have no right to discriminate against arbitration. ***Principals*** however, ***have every right to discriminate*** against arbitration.

Happily, Petitioners recognize their error later in their briefing. (*See id.* at p.6) Evidence of discrimination by the principal, as with all discriminations, may arise affirmatively, or by omission. This Court has simply announced what language signifies an omission as a matter of law. ***The power must be affirmatively set out, or it is omitted.*** This is the crux of the issue at bar.

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, even sacred, liberties.

The Dissent calls the comparative list in the quotation *supra*, a "parade of horribles."

> The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA.

By lumping in arbitration with the "parade of horribles," the Dissent believes the Majority shows animus toward arbitration. Respectfully, this is not necessarily so. The list is not really a "parade of horribles." In many instances the decisions listed in the parade may actually be highly beneficial to the principal under the circumstances, *e.g.*, marrying by proxy. *See State v. Anderson*, 396 P2d 558, 561 (Ore. 1964) ("There is nothing about a proxy marriage, that appears to be contrary to public policy."). The decision to marry, by proxy or otherwise, is not a "horrible" one. It is however, a ***monumental decision***, in effect altering the principal's status in society.[3] If the agent might make the decision to execute a marriage is ***foreseen*** by the principal, surely the principal would make this authority clear in any power-of-attorney instrument. If not set out, the courts will deem it to be omitted. This is not discrimination or animus.[4]

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[3] But unlike the arbitration contract at bar, it is possible to break marital contract and obtain a civil divorce.

[4] It goes without saying that the U.S. Supreme Court considers "marriage" a right, a good, and something to be favoured. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Petitioners deny the significance of the decision to waive trial rights generally vis-à-vis a party, even potentially in perpetuity. (See Petition at p.3)[5] By implication, Petitioners suggest that courts should treat all decisions by agents with complete indifference; yet the document from whence this Court derives its authority and jurisdiction—the Kentucky Constitution—calls the subject matter here "sacred." Certainly the Commonwealth and its people, as well as the United States, could alter the trial rights belonging to the people. However, the alteration ought not to be effected lightly, as its pedigree reaches back at least to the Magna Carta, wherein King John first conceded that property rights' disputes must remain in the permanent county courts, rather than follow the movable King's Bench.

It is easy enough to distinguish between the will of God and the will of the English barons, but it *is* difficult not to see the hand of Providence shepherding the resolution of disputes in Anglo-American law from the Medieval trial by combat, to the appeal to the Kings' Bench, finally to the right to a civil trial in front of one's peers. Whereas due process in the criminal law is the modus wherein the citizens' relationship with the state mainly subsists, the civil law is the modus wherein the citizens' legal relationships with each other subsists. Petitioners' protestations notwithstanding, civil trial rights are important, and fundamental. More to the point, how agency law

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[5] It is not appropriate for Respondent to comment on Petitioners' charged language on page 3 of the Petition. Suffice to say that Petitioners' institutional commentary comes off as overheated and unfortunate.

treats such rights does not in any way impact upon the FAA.

This Court in this case has not acted against arbitration. Rather, the Court has acted to specify rules in written agency. More precisely, it has engaged in the interpretation of words on a piece of paper, seeking to determine the intentions of a principal, from what is reasonably foreseeable.

Petitioners recite a litany of false analogies in their petition, one of which demonstrates their misconstruction of the issue at bar: "Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one." (Petition at p.7) This is a straw man. Again, the Court here in effect issued a canon of ***interpretation*** of language in an instrument, in the endeavor to divine the intentions of the principal. If the Kentucky legislature were to pass the aforesaid statute, presumably it would be issuing a ***proscription***. The Supreme Court here has issued no proscription.[6]

> Nursing home facilities may still enforce arbitration agreements with their residents

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[6] Whether the aforesaid proscription—limiting the circumstances under which a power of attorney may execute an arbitration agreement—would be federally pre-empted is not a question in front of this Court. If, to take a different perspective, the legislature attempted to "interpret" principal intentions statutorily, *i.e.*, not place a wicket in front of creating the agency power, but rather, claim to legislatively determine a principal's intent; such would probably constitute an invasion of the judiciary's sphere and a violation of the principle of the separation of powers. This has not occurred, and Petitioners' point is entirely irrelevant and, again, not in front of the bar.

when the resident has signed the agreement or ***validly authorized*** his agent to sign in his stead. (emphasis added)

CONCLUSION

Complaint was filed in this case years ago. Respondent prays this Court deny rehearing.

Respectfully submitted,

/s/_____
Robert E. Salyer, Esq.

SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH & REHABILITATION, *et al.*
PETITIONERS

v.

BEVERLY WELLNER, individually and on behalf of the estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER, deceased
RESPONDENT

RESPONSE TO PETITION FOR REHEARING

Submitted By:

/s/ Robert E. Salyer
Richard E. Circeo (KY Bar# 91996)
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CERTIFICATE OF SERVICE

I certify that this petition was served upon Donald L. Miller, II, Esq.; J. Peter Cassidy, III, Esq.; Kristin M. Lomond, Esq.; Quintairos, Prieto, Wood & Boyer, P.A.; 9300 Shelbyville Road, Suite 400; Louisville, KY 40222; Hon. Jean Chenault Logue, Circuit Judge,

Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 23rd day of October, 2015.

/s/ Robert E. Salyer
Counsel for Respondent

RESPONSE

The material and procedural facts, controlling law, and jurisdictional basis have not changed. This response to petition is filed pursuant to CR 76.32, which provides in part:

> **(1) When authorized.**
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> ***
>
> (b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a ***material fact*** in the record, or a ***controlling statute or decision***, or has ***misconceived the issues presented*** on the appeal or the law applicable thereto.
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> ****

I. Petitioners do not offer a sufficient justification for rehearing.

Petitioners provide this Court with no basis upon which to justify a rehearing. The facts were not in dispute in this case. There have been no facts arising

since the Opinion issued to affect its conclusions. Neither the parties nor the Court overlooked either a controlling decision or statute. The Supreme Court's analyses of the issues, including the analyses of the Dissents, were lengthy. Petitioners go on to argue in effect however, that this Court "has misconceived the issues presented on appeal or the law applicable thereto." Not so. Whether or not the Court's Opinion is correct (and it is), the Court certainly perceived all the issues squarely. A rehearing is not authorized in this instance under the Rule.

Petitioners obviously wish to re-argue to this Court, that the Court "got it wrong." Again, ***even if*** this represented a correct characterization – ***and it does not*** – such a proposition is not a legitimate basis upon which to hold a rehearing. Notwithstanding Petitioners' apparent dissatisfaction with the Opinion of this Court, this Court issued an exhaustive Opinion, in terms of both the Majority and Dissenting opinions, and, as such, it can be fairly said that the Court left no stone unturned in reaching its final result. And the decision was in fact correct.

II. The Supreme Court's decision correctly interpreted Kentucky agency and power-of-attorney law.

Whisman clarifies the law regarding Kentucky powers-of-attorney as they relate to pre- dispute arbitration agreements entered into between parties. It extends interpretation of Kentucky's law from *Donna Ping v. Beverly Enterprises, Inc.*, 376 SW3d 581 (Ky. 2012), and sets out three teachings:

First, general power-of-attorney language purporting to grant agency authority to transact any and all business that a principal could do if in per-

son, i.e., a generic proxy power, is, by itself, ineffective to alter a fundamental right of the principal under Kentucky law, *e.g.*, promising forever to forego all litigation in civil courts, of future disputes, between a principal and an outside party. *See Pine Tree Villa, LLC v. Brooker*, 612 FedAppx 340, 344 (6th Cir. 2015) ("Kentucky law does not appear to provide for unlimited POAs."). That is, the latter transactions alter the principal's status in society, at least with respect to the other party to the agreement. These transactions would thus not normatively be foreseeable by the principal, and would not be seen to be encompassed by a general grant of authority without the appropriate specific language going thereto.

Second, the ***act*** of signing a pre-dispute arbitration agreement is qualitatively different from the act of instituting or participating in an arbitration, or of ordinary actions tending to property. A reviewing court must seek out the language for signing the agreement.

Third, the power to enter into the status-altering pre-dispute agreement to arbitrate all disputes between an outside party and a principal is not immanent in specific power-of-attorney ***language*** purporting to grant agency authority (1) over litigation; or (2) over contracts involving a principal's property. Tending to these matters does not cover the alteration of the principal's civil right to a jury trial vis-a-vis disputes with a second party, potentially in perpetuity.

Just as important decisions which could be expressed in a power-of-attorney, *e.g.*, the ability to marry by proxy, or to cede parental rights, must have that authority set out; an agent waiving his

principal's trial rights generally with respect to another party must be set out. *Whisman* could not be more clear regarding vague, general, "big tent" language in a power-of- attorney. It is insufficient to execute the agreement at bar. This is so because the power to modify the fundamental rights of a principal changes that principal's standing in society, *i.e.*, it affects the principal's status. It permanently alters the principal's access to the "King's justice," with respect to at least the other party to the arbitration agreement,[1] and cannot be inferred from an instrument without explicit address.

Given its enormity, mere creation of a power over the principal's legal affairs, to include litigation and the authority to file a law suit on behalf of the principal, is not sufficient. Many powers-of-attorney include language authorizing litigation. However, it does not follow from this that ***granting power to take a certain action*** intrinsically encompasses ***the power to promise never to take that action***. Disavowal (on the principal's behalf), potentially into perpetuity, by an agent of a power given him by the principal would constitute the agent stepping into the shoes of the principal in the **creation** of the agency, *i.e.*, unilaterally rewriting the power-of-attorney.

Creation of a power to execute contracts in relation to the principal's property is likewise not sufficient. This Court agreed that ***a law suit involving a dispute*** is a species of property, a "chose-in-action." However, the gravamen of the arbitration agreement acts not in relation to that property; the

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[1] Including successors, assigns, affiliates, officers, employees, etc....

agreement acts primarily in relation to a fundamental civil right, vis-à-vis a second party.

It is sometimes pointed out that trial rights are easily waived, by the mere failure not to invoke them. But the dissimilarity here should be obvious. For an agent to transact with respect to, or disavow, a particular piece of property should obviously be small potatoes in a well- equipped power-of-attorney. For an agent to disavow the institution of property altogether, however, is entirely another matter.

II. The Court's Opinion does not impinge upon the FAA.

The U.S. Supreme Court, interpreting the FAA, has rejected numerous attempts by States to refuse to enforce arbitration contracts undoubtedly made, by virtue of their essential nature or their terms. That is not happening here.

The former point notwithstanding, the U.S. Supreme Court has never held that the FAA requires State agency law to bend to find authority to make such contracts where it otherwise would not be found. As U.S. Supreme Court Justice Clarence Thomas noted in his concurrence in *Concepcion*, *see infra*, "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the ***formation*** of the arbitration agreement." *AT&T Mobility, LLC v. Concepcion*, 131 SCt 1740, 1753 (2011). This identifies ***where*** the FAA begins to apply. It intervenes once an arbitration agreement is formed pursuant to unbiased State law principles of interpretation (including those pertaining to authority), and not before. Where the FAA does not begin to apply, the States are unbounded except by their own

self-governance... a self- governance that has a place for State judicial interpretation of State law.[2]

"A power of attorney cannot constitutionally permit formation of one type of contract but not an arbitration contract." (Petition at p. 1) The error in this statement should be obvious. Of course it can. To put it clearly and methodically: Courts have no right to discriminate against arbitration. ***Principals*** however, ***have every right to discriminate*** against arbitration.

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[2] Petitioners bring this Court's attention to *Chisholm v. Georgia*, 2 U.S. 419 (1793), but misread the case. In *Chisholm*, the U.S. Supreme Court denied that States possessed sovereign immunity (Justice Iredell dissenting), holding that all sovereignty was held by the people of the United States as an aggregate of sovereign individuals. It is commonly understood that the peoples of the United States clarified this error via the Eleventh Amendment (1795). Today, Dual Sovereignty is the accepted understanding of the American federal system. *See e.g., Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *see also* The Kentucky Resolution (1799); *Ware v. Hylton*, 3 US 199 (1796):

"In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."

Ware, 3 US at 224 (Opinion of Justice Chase). Finite authority is granted to the federal government through the U.S. Constitution and the laws promulgated therefrom; all other residual governing authority is retained by the States. U.S. Const. amend. X.

Happily, Petitioners recognize their error later in their briefing. (*See id.* at p.6) Evidence of discrimination by the principal, as with all discriminations, may arise affirmatively, or by omission. This Court has simply announced what language signifies an omission as a matter of law. ***The power must be affirmatively set out, or it is omitted.*** This is the crux of the issue at bar.

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific; general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, even sacred, liberties.

The Dissent calls the comparative list in the quotation *supra*, a "parade of horribles."

> The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive sub-

stantive rights) is the very presumption Congress sought to counteract with the FAA.

By lumping in arbitration with the "parade of horribles," the Dissent believes the Majority shows animus toward arbitration. Respectfully, this is not necessarily so. The list is not really a "parade of horribles." In many instances the decisions listed in the parade may actually be highly beneficial to the principal under the circumstances, *e.g.*, marrying by proxy. *See State v. Anderson*, 396 P2d 558, 561 (Ore. 1964) ("There is nothing about a proxy marriage that appears to be contrary to public policy."). The decision to marry, by proxy or otherwise, is not a "horrible" one. It is however, a ***monumental decision***, in effect altering the principal's status in society.[3] If the agent might make the decision to execute a marriage is ***foreseen*** by the principal, surely the principal would make this authority clear in any power-of-attorney instrument. If not set out, the courts will deem it to be omitted. This is not discrimination or animus.[4]

Petitioners deny the significance of the decision to waive trial rights generally vis-a-vis a party, even potentially in perpetuity. (*See* Petition at p.3)[5] By implication, Petitioners suggest that courts should

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[3] But unlike the arbitration contract at bar, it is possible to break marital contract and obtain a civil divorce.

[4] It goes without saying that the U.S. Supreme Court considers "marriage" a right, a good, and something to be favoured. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[5] It is not appropriate for Respondent to comment on Petitioners' charged language on page 3 of the Petition. Suffice to say that Petitioners ' institutional commentary comes off as overheated and unfortunate.

treat all decisions by agents with complete indifference; yet the document from whence this Court derives its authority and jurisdiction – the Kentucky Constitution – calls the subject matter here "sacred." Certainly the Commonwealth and its people, as well as the United States, could alter the trial rights belonging to the people. However, the alteration ought not to be effected lightly, as its pedigree reaches back at least to the Magna Carta, wherein King John first conceded that property rights' disputes must remain in the permanent county courts, rather than follow the movable King's Bench.

It is easy enough to distinguish between the will of God and the will of the English barons, but it *is* difficult not to see the hand of Providence shepherding the resolution of disputes in Anglo-American law from the Medieval trial by combat, to the appeal to the Kings' Bench, finally to the right to a civil trial in front of one's peers. Whereas due process in the criminal law is the modus wherein the citizens' relationship with the state mainly subsists, the civil law is the modus wherein the citizens' legal relationships with each other subsists. Petitioners' protestations notwithstanding, civil trial rights are important, and fundamental. More to the point, how agency law treats such rights does not in any way impact upon the FAA.

This Court in this case has not acted against arbitration. Rather, the Court has acted to specify rules in written agency. More precisely, it has engaged in the interpretation of words on a piece of paper, seeking to determine the intentions of a principal, from what is reasonably foreseeable.

Petitioners recite a litany of false analogies in their petition, one of which demonstrates their mis-

construction of the issue at bar: "Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one." (Petition at p.7) This is a straw man. Again, the Court here in effect issued a canon of ***interpretation*** of language in an instrument, in the endeavor to divine the intentions of the principal. If the Kentucky legislature were to pass the aforesaid statute, presumably it would be issuing a ***proscription***. The Supreme Court here has issued no proscription.[6]

> Nursing home facilities may still enforce arbitration agreements with their residents when the resident has signed the agreement or ***validly authorized*** his agent to sign in his stead. (emphasis added)

CONCLUSION

Complaint was filed in this case years ago. Respondent prays this Court deny rehearing.

Respectfully submitted,

/s/ Robert E. Salyer

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[6] Whether the aforesaid proscription – limiting the circumstances under which a power of attorney may execute an arbitration agreement – would be federally pre-empted is not a question in front of this Court. If, to take a different perspective, the legislature attempted to "interpret" principal intentions statutorily, *i.e.*, not place a wicket in front of creating the agency power, but rather, claim to legislatively determine a principal's intent; such would probably constitute an invasion of the judiciary's sphere and a violation of the principle of the separation of powers. This has not occurred, and Petitioners' point is entirely irrelevant and, again, not in front of the bar.

Robert E. Salyer, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 15th day of December, 2015.

/s/_____
Counsel for Movants

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. D/B/A PEOPLEFIRST REHABILITATION
MOVANTS/PETITIONERS

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002213-I

MOVANTS' MOTION FOR LEAVE TO CITE SUPPLEMENTAL AUTHORITY

Movants/Petitioners, Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc. and Kindred Rehab Services, Inc. d/b/a Peoplefirst Rehabilitation, respectfully move for leave to cite supplemental authority, specifically the

recent United States Supreme Court Opinion, rendered December 14, 2015, for consideration by this Court in the Petition for Rehearing:

DIRECTV, Inc. v. Imburgia, __ U.S. __, __ S. Ct. __ (2015), 2015 WL 8546242 (Dec. 14, 2015) (copy attached).

DIRECTV involved the California Court of Appeal's refusal to enforce an arbitration agreement pursuant to its interpretation of state law. The California Court phrased the issue as, "Does the law of California make the contract's class-arbitration waiver unenforceable?" *DIRECTV*, 2015 WL 8546242 at *3. California law previously held that class-arbitration waivers in consumer contracts were unenforceable as unconscionable. *Id.* at *3. However, in 2011, the U.S. Supreme Court held that same California rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the Federal Arbitration Act. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Regardless, the California court in *DIRECTV* concluded *Concepcion* did not change the result, that class-arbitration waivers are still unenforceable "under California law." *DIRECTV*, 2015 WL 8546242 at *3. Thus, the Court of Appeal refused to enforce the arbitration contract. *Id.*

The *DIRECTV* Court reversed, stating:

> Lower court judges are certainly free to note their disagreement with a decision of this Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior

> authority of its source. [Citations omitted]. The Federal Arbitration Act is the law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

DIRECTV, 2015 WL 8546242 at *5.

The *DIRECTV* Court summarized its focus, "we must decide not whether ... [the state court's] decision is a correct statement of California law **but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.**" *Id.* at *5 (emphasis added). Recognizing that state courts are "the ultimate authority on that [state] law," (*id.* at *5), the *DIRECTV* Court nevertheless explained its duty to "decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'" *Id.* at *6 (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)):

> And in doing so, **we must examine whether the Court of Appeal's decision in fact rests upon "grounds as exist at law or in equity for the revocation of any contract."** 9 U.S.C. § 2. That is to say, we look not to grounds that the California court might have offered but rather to those it did in fact offer.

DIRECTV, 2015 WL 8546242 at *6 (emphasis added).

The California court's interpretation of the arbitration contract was "unique, restricted to that [arbitration] field." *Id.* at * 6. *DIRECTV* cautioned state courts against such holdings that apply or interpret state law specific to arbitration contracts:

> Third, nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of "law of your state" **in any context other than arbitration**.... Even given our assumption that the Court of Appeal's conclusion is correct, **its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts** using similar language but involving state statutes invalidated by other federal law.
>
> Fourth, **the language used by the Court of Appeal focused only on arbitration**.

See DIRECTV, 2015 WL 8546242 at *6-*7 (emphasis added).

DIRECTV's reasoning may be instructive in this Petition for Rehearing. This Court evaluated the powers granted by the Clark, Whisman and Wellner POAs, specifically evaluating whether those POAs granted authority sufficient for an arbitration contract — which this Court differentiated from all other contracts[1], as containing an additional "waiver of a fundamental constitutional right" to jury trial:

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[1] "Infusing the authority to enter into 'any contract or agreement' with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurispru-

> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.**

Id. at * 15 (emphasis added).

This Court focused on whether powers expressly granted by a POA document provided sufficient authority specifically in the context of enforcing an arbitration contract. Even after finding the Clark POA granted sufficient authority to sign a contract, (see id. at * 14), the Court narrowly focused on the underlying contract's arbitral nature: "we also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority"). *Id.* at *15. *DIRECTV* holds this reasoning is preempted by the FAA. *See DIRECTV*, 2015 WL 8546242 at *8.

Because the California court's holding did not place arbitration contracts "on equal footing with all other contracts,"... and did not "give due regard ... to the federal policy favoring arbitration," (citations omitted), the Supreme Court held that the FAA preempted the Court of Appeal's decision and ruled that the state court must enforce the arbitration

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dence dictating that the principal's explicit grant of authority delineated in the power-of-attorney document is the controlling factor in assessing the scope of the powers of the attorney-in-fact." 2015 WL 5634309 at *16.

agreement. *See DIRECTV*, 2015 WL 8546242 at *8 (*citing Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987)(noting that the FAA preempts decisions that take their "meaning precisely from the fact that a contract to arbitrate is at issue"),

The analysis employed by the U.S. Supreme Court in *DIRECTV* applies to this case and may be instructive to this Court in ruling on the Petition for Rehearing. Movants cite *DIRECTV* for this reason.

A copy of the opinion is attached for the Court's ready reference.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

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RECEIPT NOTICE

TO: DONALD LEE MILLER II
FROM: SUSAN STOKLEY CLARY, CLERK
DATE: 12/16/2015

FILE NUMBER: 2013—SC-000430—I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A

APPELLANTS

V.

JANIS E. CLARK, EXECUTRIX OF THE ESTATE OF OLIVE G. CLARK, APPELLEES DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH

APPELLEES

THE DOCUMENT LISTED BELOW HAS BEEN RECEIVED AND FILED IN THIS OFFICE TODAY IN THE ABOVE CASE:

MOVANTS FILED MOTION FOR LEAVE TO CITE SUPPEMENTAL AUTHORITY.

CC: JAMES T. GILBERT
JAMES PETER CASSIDY III
ROBERT EARL SALYER
FILE COPY
KRISTIN M. LOMOND
RICHARD ERIC CIRCEO

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013 -SC-000430

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, *et al.*
MOVANTS/DEFENDANTS

v.

Janis E. Clark, as Executrix on behalf of the Estate of Olive G. Clark, deceased, and on behalf of the wrongful death beneficiaries of Olive G. Clark
RESPONDENTS/PLAINTIFFS

On Appeal from the Kentucky Court of Appeals
2012-CA-002213
Clark County Circuit Court
Civil Action No. 10-CI-00469

RESPONSE TO MOTION TO SUPPLEMENT AUTHORITIES IN SUPPORT OF PETITIONERS' PENDING PETITION FOR REHEARING

Respondents oppose the motion to supplement. The U.S. Supreme Court decision which Petitioners seek to supplement as authority, *DIRECTV, Inc. v. Imburgia*, ____ U.S. ____ S. Ct. ____ 2015 WL 8546242 (2015), has no bearing upon the petition for rehearing. The motion, like the underlying petition for rehearing, should be denied.

RESPONSE

DIRECTV, Inc. v. Imburgia, does not change or add to the law pertinent to the case at bar. As that Opinion itself maintains, *DIRECTV* in effect simply restates the law from *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), regarding enforcing arbitration agreements per their terms.

Moreover, Petitioners are profoundly misinterpreting just what this Court was doing in the consolidated case of *Extendicare Homes, Inc. v. Belinda Whisman; Kindred Nursing Centers LP v. Janis Clark; and Kindred Nursing Centers LP v. Beverly Wellner*, 2015 WL 5634309 ---SW3d---- (Ky. 2015) (hereinafter "*Whisman*"). Petitioners continue to maintain that the Federal Arbitration Act (FAA), 9 USC § 2, pre-empts *Whisman's* result. Now they wish to cite to *DIRECTV* in the matter to that effect.

In fact the FAA is not triggered by the *Whisman* decision. Petitioners' confusion lies in comprehending exactly the nature of *Whisman's* analysis. Self-evidently, this Court did not announce ***a proscription*** against executing any kind of arbitration contract, i.e., that arbitration contracts, validly-made, would not be enforced according to their terms or under certain circumstances. As no one doubts, parties have an unencumbered right to enter into arbitration agreements in Kentucky. Rather, the *Whisman* Court ***engaged in an interpretation of a personal legal writing and grant of authority***, i.e., a power-of-attorney executed by a private party.

I. As the Kentucky Supreme Court is the final interpreter of the General Assembly's statutes, so too is the Kentucky Supreme Court the final interpreter of the power-of-attorney.

To use an analogy, while the Kentucky General Assembly may not prevent anyone from executing an arbitration agreement, it certainly ***could*** discriminate against arbitration in effect ***by declining to create authority*** to execute arbitration contracts in a Kentucky statutory scheme setting up a statutory agent (*e.g.*, a guardian in a State guardianship scheme). And the U.S. Supreme Court has time and again made clear that State statutory interpretation of what a State legislature has created, *i.e.*, the proper interpretation of that State's own laws, is binding upon all courts, as the definitive ***interpretation***.[1] "There is no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 US 476, 483 (1993) *(citing R.A.V. v. St. Paul*, 505 US 377, 381 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Whereas the question of whether a State legislation is (U.S.) Constitutional or not, may fall upon the U.S. Supreme Court, ***interpreting what the State legislation means***, is entirely a State judicial function.

This same principle applies to interpreting the principal's meaning in a power-of-attorney. *See U.S. v. Bussey*, 452 FSupp 891, 895 (D.C.La. 1978) ("[W]e can find no authority which holds that federal law

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[1] Logically, if the State Supreme Court erred in interpreting a State statute, it would be up to that's State's legislature to correct the high court's error.

governs the interpretation or effect of a power of attorney."); *see also J.F. Toner & Son, Inc. v. Farm Credit Bank of Baltimore*, 1992 WL 404372 (W.D.Va.) ("[T]he interpretation, issuance and use of a power of attorney is governed entirely by state law."). And even Petitioners have conceded that, while the courts may not discriminate against arbitration, principals surely can. And who is the final decision-maker in what a principal has done, in a controversy at bar?

This Court.

A power-of-attorney is in some sense the creation of "personal law," whereby a principal (analogous to the legislature empowering a statutory agent) is legally empowering the principal's agent to act on the principal's behalf. The Kentucky Supreme Court has engaged in ***interpretation***; it has not engaged in a ***proscription*** of arbitration, and thus the FAA is not implicated.

II. *DIRECTV v. Imburgia* is a case pertaining to interpreting and construing a contract, and when to revoke that contract;[2] it is not a case pertaining to interpreting an instrument of agency authority.

In *DIRECTV v. Imburgia*, the media corporation defendant provided a form contract to its California consumers which included a conditional arbitration clause. This arbitration clause included language prohibiting class action arbitration. However, the (pre-*Concepcion*) clause also provided that "if the

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[2] To provide the context and lineage behind the *DIRECTV* decision, in 2011 *AT&T v. Concepcion* struck down California's law restricting class action waivers in arbitration agreements.

'law of your state,' makes the waiver of class arbitration unenforceable, then the entire [arbitration] provision 'is unenforceable.'"[3] *See DIRECTV* at *3. Bizarrely, the California courts held that this provision incorporated pre-*Concepcion* (and invalid) California consumer law prohibiting class waivers in consumer arbitration into the *DIRECTV* contract, meaning that the arbitration clause as a whole was nullified by its own operation.

The U.S. Supreme Court reversed, keeping in mind the words of 9 USC § 2 (emphasis added):

> A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract... shall be valid, irrevocable, and enforceable, save upon such grounds ***as*** exist at law or in equity ***for the revocation of any contract***.

California does not routinely import defunct, invalid law into contracts, just in order to dismantle those contracts. Given that the evinced intent of the contracting *DIRECTV* parties was to enter into an arbitration agreement, and given that this intention would be satisfied by the importation of valid post-*Concepcion* California law, and could only be upset by the importation of obsolete, pre-empted, pre-*Concepcion* law; normative contract construction would opt for the former. A court would only opt for

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And so the ultimate question must be this: What institution is the ultimate authority on the meaning of a power-of-attorney, executed and used in a particular State, and involving that States' citizens as principal and agent? The obvious answer is, again: That State's Supreme Court. The FAA does not signal any intention of Congress that State courts (or federal courts for that matter) interpret State agency law in such a manner that they would not otherwise do, were the FAA not to exist. Indeed, Respondent has searched and found no instance where State agency law has been commandeered to advance a federal statutory right, however much such a right is favoured.[4]

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[4] Absurd and inconsistent results would arise if the American judiciary routinely interpreted State agency law contingent upon the existence of a federal statute to which a litigant had creatively tied a question of authority. Rather, a power-of-attorney is an objective statement of authority.

CONCLUSION

Petitioners have made amply clear their dissatisfaction with *Whisman*. It is time to move on.

Whisman, in its essence, is a case about interpreting a written grant of authority, the power-of-attorney—not contract interpretation or construction—and thus *DIRECTV* has no application. Certainly *DIRECTV* announces nothing constituting good cause for reconsideration pursuant to the black letter of CR 76.32, which provides (emphasis added):

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Petitioners' disappointment is not the standard for CR 76.32 relief, and *DIRECTV* does nothing to meet Petitioners' burden. Respondent prays this Court deny Petitioners' motion to supplement.

Submitted By:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served via U.S. Mail, with sufficient postage thereon to ensure delivery, this 6th day of July, 2015, upon the following:

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The Kentucky Court of Appeals
360 Democrat Dr.
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/s/
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Attorneys for Respondent

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

CASE NO. 2013-SC-000431

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, et al.
PETITIONERS/DEFENDANTS

v.

Beverly M. Wellner, Individually, an on behalf of the Estate, of Joe P. Wellner, deceased, and on behalf of the wrongful death beneficiaries of Joe P. Wellner
RESPONDENTS/PLAINTIFFS

On Appeal from the Kentucky Court of Appeals
2013-CA-002212
Clark County Circuit Court
Civil Action No. 10-CI-00472

RESPONSE TO MOTION TO SUPPLEMENT AUTHORITIES IN SUPPORT OF PETITIONERS' PENDING PETITION FOR REHEARING

Respondents oppose the motion to supplement. The U.S. Supreme Court decision which Petitioners seek to supplement as authority, *DIRECTV, Inc. v. Imburgia*, __U.S. __, __ S. Ct. __ 2015 WL 8546242 (2015), has no bearing upon the petition for rehearing. The motion, like the underlying petition for rehearing, should be denied.

RESPONSE

DIRECTV, Inc. v. Imburgia, does not change or add to the law pertinent to the case at bar. As that Opinion itself maintains, DIRECTV in effect simply restates the law from *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), regarding enforcing arbitration agreements per their terms.

Moreover, Petitioners are profoundly misinterpreting just what this Court was doing in the consolidated case of *Extendicare Homes, Inc. v. Belinda Whisman; Kindred Nursing Centers LP v. Janis Clark;* and *Kindred Nursing Centers LP v. Beverly Wellner*, 2015 WL 5634309 --- SW3d---- (Ky. 2015) (hereinafter "*Whisman*"). Petitioners continue to maintain that the Federal Arbitration Act (FAA), 9 USC § 2, pre-empts *Whisman*'s result. Now they wish to cite to *DIRECTV* in the matter to that effect.

In fact the FAA is not triggered by the *Whisman* decision. Petitioners' confusion lies in comprehending exactly the nature of *Whisman*'s analysis. Self-evidently, this Court did not announce a proscription against executing any kind of arbitration contract, i.e., that arbitration contracts, validly-made, would not be enforced according to their terms or under certain circumstances. As no one doubts, parties have an unencumbered right to enter into arbitration agreements in Kentucky. Rather, the *Whisman* Court engaged in an interpretation of a personal legal writing and grant of authority, i.e., a power-of-attorney executed by a private party.

III. As the Kentucky Supreme Court is the final interpreter of the General Assembly's statutes, so too is the Kentucky Supreme Court the final interpreter of the power-of-attorney.

To use an analogy, while the Kentucky General Assembly may not prevent anyone from executing an arbitration agreement, it certainly ***could*** discriminate against arbitration in effect ***by declining to create authority*** to execute arbitration contracts in a Kentucky statutory scheme setting up a statutory agent (*e.g.*, a guardian in a State guardianship scheme). And the U.S. Supreme Court has time and again made clear that State statutory interpretation of what a State legislature has created, *i.e.*, the proper interpretation of that State's own laws, is binding upon all courts, as the definitive ***interpretation***.[1] "There is no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 US 476, 483 (1993) (*citing R.A.V v. St. Paul*, 505 US 377, 381 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Whereas the question of whether a State legislation is (U.S.) Constitutional or not, may fall upon the U.S. Supreme Court, ***interpreting what the State legislation <u>means</u>***, is entirely a State judicial function.

This same principle applies to interpreting the principal's meaning m a power-of- attorney. *See US. v. Bussey*, 452 FSupp 891, 895 (D.C.La. 1978) ("[W]e can find no authority which holds that federal law

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[1] Logically, if the State Supreme Court erred in interpreting a State statute, it would be up to that's State legislature to correct the high court's error.

governs the interpretation or effect of a power of attorney."); *see also J.F Toner & Son, Inc. v. Farm Credit Bank of Baltimore*, 1992 WL 404372 (W.D.Va.) ("[T]he interpretation, issuance and use of a power of attorney is governed entirely by state law."). And even Petitioners have conceded that, while the courts may not discriminate against arbitration, principals surely can. And who is the final decision-maker in what a principal has done, in a controversy at bar?

This Court.

A power-of-attorney is in some sense the creation of "personal law," whereby a principal (analogous to the legislature empowering a statutory agent) is legally empowering the principal's agent to act on the principal's behalf. The Kentucky Supreme Court has engaged in ***interpretation***; it has not engaged in a ***proscription*** of arbitration, and thus the FAA is not implicated.

IV. *DIRECTV v. Imburgia* is a case pertaining to interpreting and construing a contract, and when to revoke that contract[2]; it is not a case pertaining to interpreting an instrument of agency authority.

In *DIRECTV v. Imburgia*, the media corporation defendant provided a form contract to its California consumers which included a conditional arbitration clause. This arbitration clause included language prohibiting class action arbitration. However, the (pre-*Concepcion*) clause also provided that "if the

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